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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ CM(M) No.806/2017 and CM No.27161/2017 (for stay).

DR D K SETH

..... Petitioner

Through: Mr. Brij Bhushan Gupta, Sr. Adv.
with Mr. Deepak Vohra and Mr.
Apoorv Gupta, Advs.

versus

DR DURGA PRASAD RAY

..... Respondent

Through: None.

CORAM:

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

ORDER

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01.08.2017

**CM No.27163/2017 (for exemption) and CM No.27162/2017
(exemption from filing Trial Court record).**

1. Allowed, subject to just exceptions.
2. The applications stand disposed of.

CM(M) No.806/2017 and CM No.27161/2017 (for stay).

3. This petition under Article 227 of the Constitution of India impugns the order (dated 27th May, 2017 in CS No.143/13 (98811/16) of the Court of Civil Judge-03 (Central), Tis Hazari Courts, Delhi) allowing the application of the respondent / plaintiff for amendment of the plaint.
4. The petitioner / defendant in the petition has raised two grounds. Firstly, that the claim added by way of amendment was barred by Order II Rule 2 of the Code of Civil Procedure, 1908 (CPC) and secondly that the claim sought to be added by way of amendment was barred by time.
5. The learned Civil Judge in the impugned order has held that Order II Rule 2 of the CPC has no application to amendment in a pending suit

and qua limitation, that the said question did not arise in view of Section 40 of the Specific Relief Act, 1963.

6. The senior counsel for the petitioner / defendant has been heard.

7. The respondent / plaintiff instituted the suit from which this petition arises for permanent injunction to restrain the petitioner / defendant from spreading defamation amongst colleagues, staff and all concerned “in Hospital and society at large”.

8. By way of amendment, the respondent / plaintiff wanted to add the relief of damages in the sum of Rs.3,00,000/- for defamation, in addition to the relief of injunction.

9. The senior counsel for the petitioner / defendant has argued that though as per settled law the bar of Order II Rule 2 of the CPC would not apply for seeking an amendment but in the present case the respondent / plaintiff, after the institution of the suit for permanent injunction from which this petition arises, had instituted a suit for recovery for the same amount of damages for defamation and the plaint wherein was rejected as barred by Order II Rule 2 of the CPC and which order had attained finality. It is argued that a specific separate claim made for damages having been rejected, the amendment in the suit for injunction, to claim the same relief, could not have been permitted.

10. In my view the dismissal of the separate suit filed for the relief which was sought to be added by way of amendment in the pending suit, on the ground of being barred by Order II Rule 2 of the CPC, would not bar the amendment in the pending suit, to claim the same relief. Dismissal of the separate suit filed for damages on the ground of Order II Rule 2 of the CPC in my view would not constitute *res judicata* within

the meaning of Section 11 of the CPC, to bar the respondent / plaintiff from claiming by way of amendment the relief which was held to be barred by Order II Rule 2 of the CPC. The words used in Section 11 of the CPC bar the Court from trying any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit' between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court. Dismissal of a suit as barred by Order II Rule 2 of the CPC would not amount to claim of damages having been heard and finally decided by the Court.

11. The senior counsel for the petitioner / defendant has himself drawn attention to Order VII Rule 13 of the CPC which in the event of rejection of the plaint does not preclude presentation of a fresh plaint. Applying the said provision also, the claim by way of amendment would be barred.

12. The senior counsel for the petitioner / defendant however states that the same will be subject to limitation.

13. That being a separate ground taken for rejection, would be considered thereunder.

14. There is thus no merit in the plea of the order allowing amendment to be bad for the reason of the claim sought to be made by amendment being barred by Order II Rule 2 of the CPC.

15. As far as the aspect of limitation is concerned, the senior counsel for the petitioner / defendant has drawn attention to Articles 75 and 76 of

the Schedule to the Limitation Act, 1963 and has contended that the limitation for a suit for compensation for libel or slander is one year from the date when the libel is published or from the date when words are spoken. It is contended that the claim for compensation for defamation was made after three years from the date of publication of the allegedly defamatory words and the claim sought to be added by way of amendment was thus barred by time.

16. I have enquired from the senior counsel for the petitioner / defendant, whether not the settled principle of law is that the merits of amendment are not to be gone into at the stage of considering the application for amendment.

17. The senior counsel though agreeing contends that however where the claim sought to be added by way of amendment is apparently barred by time, amendment should not be allowed.

18. The learned Civil Judge has reasoned that addition of the claim for damages to the claim for injunction was permitted to be added at any time as per Section 40 of the Specific Relief Act, 1963 which is as under:-

“40. Damages in lieu of, or in addition to, injunction - (1)
The plaintiff in a suit for perpetual injunction under section 38, or mandatory injunction under section 39, may claim damages either in addition to, or in substitution for, such injunction and the court may, if it thinks fit, award such damages.

(2) No relief for damages shall be granted under this section unless the plaintiff has claimed such relief in his plaint:

PROVIDED *that where no such damages have been claimed in the plaint, the court shall, at any stage of the proceedings,*

allow the plaintiff to amend the plaint on such terms as may be just for including such claim.

(3) The dismissal of a suit to prevent the breach of an obligation existing in favor of the plaintiff shall bar his right to sue for damages for such breach.”

19. The senior counsel for the petitioner / defendant on enquiry states that he has not found any judgment on Section 40 supra.

20. I have enquired, whether not Section 40 is *pari materia* to Section 21 of the Specific Relief Act as under:-

“21. Power to award compensation in certain cases - (1) In a suit for a specific performance of a contract, the plaintiff may also claim compensation for its breach, either in addition to, or in substitution of, such performance.

(2) If, in any such suit, the court decides that specific performance ought not to be granted, but that there is a contract between the parties which has been broken by the defendant, and that the plaintiff is entitled to compensation for that breach, it shall award him such compensation accordingly.

(3) If, in any such suit, the court decides that specific performance ought to be granted, but that it is not sufficient to satisfy the justice of the case, and that some compensation for breach of the contract should also be made to the plaintiff, it shall award him such compensation accordingly.

(4) In determining the amount of any compensation awarded under this section, the court shall be guided by the principles specified in section 73 of the Indian Contract Act, 1872.

(5) No compensation shall be awarded under this section unless the plaintiff has claimed such compensation in his plaint:

PROVIDED that where the plaintiff has not claimed any such compensation in the plaint, the court shall, at any stage of the

proceeding, allow him to amend the plaint on such terms as may be just, for including a claim for such compensation.

Explanation : *The circumstance that the contract has become incapable of specific performance does not preclude the court from exercising the jurisdiction conferred by this section.”*

and qua which law is well settled that the claim for damages can be permitted to be made at any time, even if barred by time.

21. The senior counsel for the petitioner / defendant contends that there is a difference in a claim for damages in a suit for specific performance of an Agreement of Sale and damages for defamation for which a special period of limitation has been provided.

22. I have twice enquired from the senior counsel for the petitioner / defendant, whether the petitioner / defendant desires adjudication of the said question at this stage itself and whether not from the aforesaid itself, it is clear that the question of limitation is not such, which can be said to be apparent for the amendment to be denied.

23. The senior counsel, under instructions, states that the petitioner / defendant desires the question to be adjudicated at this stage.

24. Though the senior counsel for the petitioner / defendant has argued that there is no judgment on Section 40 supra but I find this Court, in ***Jagdish Vs. Har Sarup*** ILR (1978) II Del 266 to have held that the proviso to sub Section (2) of Section 40 shows that howsoever belated the request for amendment may be and even if the claim put forward by way of amendment is hopelessly barred by limitation, it is the bounden duty of the Court to allow the amendment. The said view was followed in (i) ***J.K. Churamani Vs. Escorts Ltd.*** (1989) 39 DLT 380; (ii)

Singilidevi Veera Venkata Ananthalakshmi Vs. Bhamidipati Seetharamayya 2003 SCC OnLine AP 1001; and, (iii) *Sunil Kuthiala Vs. Ajwesh Sood*, 2006 SCC OnLine HP 60.

25. While the order is being dictated, the instruction of the senior counsel is, to leave the said question open.

26. The petitioner / defendant withdraws the petition with liberty to take up aspect of limitation at the final stage of the suit.

27. Dismissed as withdrawn.

No costs.

RAJIV SAHAI ENDLAW, J

AUGUST 01, 2017

‘pp’..